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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14
15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 ARNOLD CRUZ RODRIGUEZ,
19 Defendant.

No. 19-cr-00381-CRB

DEFENDANT ARNOLD CRUZ
RODRIGUEZ'S SENTENCING
MEMORANDUM AND MOTION FOR
DOWNWARD VARIANCE IN
SENTENCING

Date: September 16, 2020
Time: 1:30 p.m.
Court: Hon. Charles R. Breyer

20
21 I. INTRODUCTION

22 Defendant Arnold Cruz Rodriguez respectfully submits this Sentencing Memorandum and
23 Motion for Downward Variance in Sentencing. Mr. Cruz Rodriguez was arrested by the
24 Government during its 2019 crackdown on street drug dealing in the Tenderloin district of San
25 Francisco. He has been detained for more than 13 months at Santa Rita Jail on these charges.
26 During his incarceration, he has been quarantined four times over 5 months for possible COVID-19
27 exposure and then, unfortunately, for a COVID-19 infection. An appropriate sentence in this case is
time served (13 months).

28 The mental stress from repeated quarantines during the pandemic and his physical affliction
with a life-threatening disease make this requested sentence of time served significantly longer than

1 the actual time of 13 months. The Government agrees a Guidelines sentence is not appropriate in
 2 this case and recognizes that Mr. Cruz Rodriguez was a street dealer, but it claims he was trying to
 3 move up and his sentence should be greater than other street dealers in this case. *See U.S.*
 4 Sentencing Memo. at 1-2, filed Sept. 10, 2020 (Dkt. #285) (“Gov. Sentencing Memo.”). The grim
 5 reality is Mr. Cruz Rodriguez has already served a significantly greater sentence and faces uncertain
 6 future health consequences caused by his incarceration at Santa Rita Jail. He has a wife and two
 7 young boys and a disabled mother in Honduras, all depending on his support when he was deported to
 8 his home country. His education stopped in third grade and he has helped support his mother and
 9 family since the age of 9 or 10, but now he has the anxiety of wondering if his incarceration at Santa
 10 Rita Jail will eventually rob him of his ability to meet those responsibilities due to his compromised
 11 health. This unfortunate reality of the pandemic and other sentencing factors under Section 3553(a)
 12 support the request for a sentence of time served.

13 **II. STATEMENT OF FACTS**

14 Mr. Cruz Rodriguez was arrested on August 7, 2019 as part of the Government’s prosecution
 15 of street-level drug dealers in the Tenderloin district of San Francisco, and he has been held in
 16 custody at Santa Rita Jail for more than 13 months. (Dkt. #24.) On June 16, 2020, the Government
 17 filed a Superseding Information against Mr. Cruz Rodriguez that charged him with one count of
 18 conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21
 19 U.S.C. §§ 846 & 841(a)(1) & (b)(1)(C), which carries no mandatory minimum sentence.
 20 (Dkt. #240.) On July 29, 2020, Mr. Cruz Rodriguez entered a guilty plea to Count 1 of the
 21 Superseding Information, pursuant to a plea agreement filed with the Court. (Dkt. #268.) In the plea
 22 agreement, Mr. Cruz Rodriguez admitted that he entered into a conspiracy with others from
 23 approximately January 2019 to August 2019 to distribute controlled substances, including heroin,
 24 methamphetamine, and cocaine base. *See Plea Agreement ¶¶ 1-2, filed July 29, 2020 (Dkt. #270).*
 25 He admitted that he met with and sold methamphetamine and heroin to an individual working as a
 26 Confidential Source (“CS”) for the Government on four occasions in 2019. (*Id.* ¶ 2.)

27 The discovery shows that Mr. Cruz Rodriguez was a street-level dealer and he did not control
 28 of large amounts of controlled substances. The agents heard Mr. Cruz on the wiretap obtaining small

1 quantities of drugs for street-level sales in January 2019 and had identified Mr. Cruz by the time of
 2 his first sale to the CS on February 13, 2019. *See* Gov. Sentencing Memo. at 3-4. The CS contacted
 3 Mr. Cruz Rodriguez to purchase drugs, not the other way around, and the four sales were all to the
 4 same CS. *See id.* at 4; Plea Agreement ¶ 2. The CS requested to purchase a pound of
 5 methamphetamine, but Mr. Cruz Rodriguez was unable to access pound-quantities. Gov. Sentencing
 6 Memo. at 2. There is no evidence Mr. Cruz Rodriguez controlled pricing of the drugs or controlled
 7 the supply of drugs; he acted as a delivery person or broker for the sales to the CS. The Government
 8 obtained Court orders authorizing the physical location monitoring (ping data) of Mr. Cruz
 9 Rodriguez's mobile telephone number during March to June 2019, and the installation of GPS
 10 Tracker devices on a Ford Escape and a Nissan Sentra that were used by Mr. Cruz Rodriguez.
 11 Declaration of A. Boro at ¶ 7, filed concurrently herewith ("Boro Decl."). Despite this extensive
 12 surveillance of Mr. Cruz Rodriguez, the Government found no other substantial drug sales by him.

13 The parties waived the preparation of a presentence report for this sentencing. (Dkt. #268.)
 14 Mr. Cruz Rodriguez's sentencing hearing was originally set for August 26, 2020, but was continued
 15 because his housing unit at Santa Rita Jail was under quarantine due to COVID-19. Boro Decl. at
 16 ¶ 5. Unfortunately, this was not the first time Mr. Cruz Rodriguez's housing unit at Santa Rita Jail
 17 was placed under quarantine, and on this occasion Mr. Cruz Rodriguez ultimately tested positive for
 18 COVID-19. *Id.* He is no longer exhibiting symptoms of COVID-19. *Id.* at ¶ 6.

19 III. SENTENCING GUIDELINES CALCULATION

20 The parties agreed in the plea agreement to a Sentencing Guidelines calculation with a Base
 21 Offense Level of 32 (USSG §§ 2D1.1(a)(5) & (c)(4)), less 3 levels for Acceptance of Responsibility
 22 (*id.* §3E1.1), for a Total Offense Level of 29. The parties agree that Mr. Cruz Rodriguez is a
 23 Criminal History Category I. The recommended Guidelines range is 87 to 108 months.

24 IV. THE MOTION FOR DOWNWARD VARIANCE SHOULD BE GRANTED 25 AND MR. CRUZ RODRIGUEZ SENTENCED TO TIME SERVED.

26 This is a case where the application of the Section 3553(a) factors show that the
 27 recommended Guidelines sentence is very far afield from Congress's directive to "impose a
 28 sentence sufficient, but not greater than necessary," to accomplish the goals of sentencing."

1 *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)). As the Ninth
 2 Circuit has made clear, “The Guidelines are not only *not mandatory* on sentencing courts; they are
 3 also not to be *presumed reasonable.*” *Nelson v. United States*, 555 U.S. 350, 352 (2009) (*per*
 4 *curiam*) (emphasis in original). In this case, application of the Section 3553(a) factors supports a
 5 sentence of time served (13 months) for Mr. Cruz Rodriguez.

6 First, the “nature and circumstances of the offense and the history and characteristics of the
 7 defendant,” as well as considerations of “promoting respect for the law,” “deterrence,” and
 8 “protect[ion of] the public,” support the conclusion that Mr. Cruz Rodriguez has served sufficient
 9 time for his crime. *See* 18 U.S.C. § 3553(a)(1) & (2). He has accepted responsibility for his
 10 participation in a conspiracy to distribute drugs. The Government characterizes him as “one of over
 11 a dozen street-level drug dealers” in the charged conspiracy and a person seeking to work his way up
 12 by selling ounce-quantities of drugs to the CS. Gov. Sentencing Memo. at 1-2. But the Government
 13 candidly admits that he could not access larger quantities, though pressed by the CS to do so. *Id.*
 14 Notwithstanding the use of a CS targeting Mr. Cruz Rodriguez and extensive Government
 15 surveillance of his movements, Boro Decl. at ¶ 7, no additional drug sales were found.

16 The punishment already meted is sufficient to punish this conduct for a person with no prior
 17 criminal convictions. If Mr. Cruz Rodriguez and the other Tenderloin district street-level drug
 18 dealers had been charged in state proceedings instead of this federal prosecution, they might have
 19 been given diversion and drug treatment. The thirteen months of actual time he has served exceeds a
 20 two-year California state prison sentence, served at 50 percent time, which a first-time, non-violent
 21 offender might have received for this drug offense. Mr. Cruz Rodriguez is a Criminal History
 22 Category I, and a 13-month sentence served is sufficient to deter future violations for a person with
 23 no prior convictions or prison sentences.

24 But the punishment he has received is much greater than the 13-months of actual time served
 25 due to his detention at Santa Rita Jail during the COVID-19 pandemic. Mr. Cruz Rodriguez has
 26 been quarantined for suspected or actual COVID-19 exposure on four separate occasions from April
 27 2020 through August 2020 for about 58 days. Boro Decl. ¶¶ 5-6. He has been quarantined 47 days
 28 under the “Yellow” category, and, following a positive test on August 15, 2020 confirming he was

1 infected with COVID-19, for 11 days under the “Red” category.¹ *Id.*

2 Mr. Cruz Rodriguez reports that following his positive test for COVID-19, he had several
 3 days where his breathing was more difficult. *Id.* He was locked up in an isolation cell with no
 4 medical equipment – it appeared to him to be part of the maximum-security housing area; it was not
 5 a hospital room – and was visited twice a day for a temperature and an oxygen check. *Id.* The only
 6 medication he received was Tylenol. *Id.* After about 11 days, he was released back to a normal
 7 housing unit but was not given another COVID-19 test to verify he was no longer infected.² *Id.* He
 8 worries that his health has been compromised, and he may not be able to provide for his young
 9 children and his mother.³ The psychological trauma from repeated exposure to the virus at Santa
 10 Rita Jail and fear that it is ever so close, and then actually contracting the virus with unknown long-
 11 term health consequences is significant punishment, far exceeding the 13 months of time served.

12 Second, Mr. Cruz Rodriguez’s “history and characteristics” support a downward variance to
 13 the 13 months served. He is not a person who grew up with plenty of opportunity yet chose to
 14 commit a crime. He grew up in poverty in the small Honduran town of Escano de Tepale in the
 15 Francisco Morazán Department of Honduras, in the mountains, about a three-hour drive from the
 16 capital city Tegucigalpa. Mr. Cruz Rodriguez only went to school until third grade, and then at the
 17 age of 9 or 10 he worked in the fields (owned by others) to help support his family, tending to
 18 tomatoes, chili peppers, and onions. He is 29 years old. His Mom is disabled, on crutches. His
 19 family is very poor and work in the fields to provide for their sustenance. Counsel has obtained from
 20 Mr. Cruz Rodriguez’s wife photographs of his family, including his Mom and nephews, and the

22 ¹ Santa Rita Jail uses “Yellow” when inmates are quarantined due to exposure to a person who may have COVID-19,
 23 such as when an inmate in a housing unit exhibits symptoms of COVID-19, resulting in the other inmates being
 24 quarantined for 14 days or until the index case is confirmed negative, and “Red” for inmates who display symptoms or
 25 test positive for COVID-19. See Santa Rita Jail COVID-19 Outbreak Control Plan at 4, dated Aug. 25, 2020 (available at
<https://alamedacountysheriff.org/files/COVIDPlan08182020.pdf>).

26 ² Mr. Cruz Rodriguez’s experience is consistent with the Santa Rita Jail Outbreak Control Plan for “Red” inmates,
 27 including isolation cells, sick calls twice a day at the cell door, and no follow-up COVID-19 test for those with mild
 28 symptoms or who are asymptomatic. *Id.* at 4-8.

³ Because this is a novel coronavirus that was identified only about 10 months ago, the long-term health consequences
 27 are not yet known, but medical institutions have warned of this danger based on experiences with other viruses and
 28 studies are being undertaken now to better understand the risk. See Mayo Clinic, “COVID-19 (coronavirus): Long-
 Term Effects Possible,” (available at <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>); Nat’l Institute of Health - NHLBI, “Looking forward: Understanding the Long-Term
 Effects of COVID-19,” June 3, 2020 (available at <https://www.nhlbi.nih.gov/news/2020/looking-forward-understanding-long-term-effects-covid-19>).

1 modest family home. Boro Decl. Ex. 2.

2 Mr. Cruz Rodriguez's mother, Reyna Rodriguez, has written a letter to the Court. She
 3 acknowledges her son made a mistake, but she asks the Court to give him another opportunity to
 4 make amends for his crime. She states he is and has always been critical for her and the family's
 5 support: "he has been my help, my sustenance. Since he was able to work, he never let go of my
 6 hand." Boro Decl. Ex. 1.

7 Mr. Cruz Rodriguez's family situation and his need to provide support his wife and young
 8 children also favor a downward variance. Before his arrest, Mr. Cruz Rodriguez was living in
 9 Oakland with his wife, Marta Torres. They have two young boys, ages 5 and 3. Photographs of
 10 their two sons are attached to the Boro Declaration. *Id.* Ex. 3. He previously had a daughter, Zoe, in
 11 Honduras, but she was born with a respiratory illness, and needed medication to survive. At first, the
 12 medication was provided for free, and then he and his family were given a prescription for her
 13 continued medication, which they had no means to pay for. She died before her first birthday. Due
 14 to his incarceration and his wife's loss of work because of the COVID-19 pandemic, his wife has had
 15 no money to support them and has sent their 5-year-old son to live in Honduras with Mr. Cruz
 16 Rodriguez's family. The plan is for her and their 3-year-old son to join Mr. Cruz Rodriguez in
 17 Escano de Tepale, when he is deported, which he surely will be. She has also written a letter to the
 18 Court in which she "request[s] another chance" for Mr. Cruz Rodriguez, and states she and their
 19 children, as well as Mr. Cruz Rodriguez's mother, siblings, and nieces and nephews have been
 20 "going through a bad situation" because of his inability to provide needed support. Boro Decl. Ex. 1.

21 Mr. Cruz Rodriguez knows he has made a serious mistake, and has accepted responsibility
 22 for his actions. His personal characteristic of drug usage, while not excusing his conduct, helps
 23 explain it. He has used marijuana and cocaine. He had been previously arrested by SFPD for street
 24 dealing and was put into a diversion program but was deported before he could start drug treatment.
 25 He realizes he is responsible for the choices he has made, and believes he will do better this time
 26 when he is back in Honduras with his family.

27 Third, the sentencing factor of avoiding "unwarranted sentence disparities" supports the
 28 requested sentence of time served (13 months). *See* 18 U.S.C. § 3553(a)(6). The Government does

not request a Guidelines sentence but instead “recommends that this Court impose a custodial sentence greater than those imposed on other street-level dealers previously sentenced in this case.” Gov. Sentencing Memo. at 6. Most of the alleged street-dealer defendants in this case and the related case, No. 19-cr-00367-CRB, received sentences of time served, which worked out to between 1 month, 18 days and 9 months, 2 days, and one received a sentence of 12 months, 1 day:

Case	Name	Sentence	Sentence Date	Crim. Min. Dkt. #
19-cr-381	Jose Franklin Rodriguez Garcia	12 months, 1 day	3/4/20	153
19-cr-381	Kevin Arteaga-Morales	8 months, 14 days	4/30/20	193
19-cr-381	Brayan Martinez	8 months, 23 days	4/30/20	195
19-cr-381	Christian Rodriguez-Valle	9 months, 7 days	5/14/20	215
19-cr-381	Eric Montoya Marquez	3 years' probation (served 10 months, 18 days)	6/25/20	252
19-cr-367	Julio Cesar Viera-Chinrinos	4 months, 18 days	12/18/19	143
19-cr-367	Yordi Yavier Agurcia Galindo	6 months, 4 days	2/12/20	175
19-cr-367	Gustavo Gamez-Velasquez	7 months	3/11/20	196
19-cr-367	Elvin Mejia-Padilla	7 months	3/11/20	197
19-cr-367	Rudis Valladeres-Caceres	7 months, 3 days	3/11/20	202
19-cr-367	Rodulio Alexo Garcia	1 month, 18 days	3/18/20	209

The exception was one alleged street dealer who received 15 months (a handgun was found in a bedroom dresser drawer, allegedly next to his indicia)⁴ and another who received 36 months (he allegedly acted as the “right hand man” to the alleged conspiracy leader).⁵ But those sentence reflected conduct more serious than in Mr. Cruz Rodriguez’s case.

In view of the prior sentences imposed in this case, the requested sentence of time served (13 months) is appropriate. The Government agrees that Mr. Cruz Rodriguez is a street level dealer, except he sold ounce-quantities on four occasions at the request of the CS. He has no prior criminal convictions and is not a violent offender.

Moreover, the 13 months he has served in Santa Rita Jail should be counted as much more than 13 months due the extreme distress he has endured from repeated quarantines for COVID-19 and then contracting COVID-19 while incarcerated. During the pandemic, Mr. Cruz Rodriguez has

⁴ See Gov. Sentencing Memo. re A. Funez Osorio at 2 & 5, No. 19-cr-00381-WHO, filed May 27, 2020 (Dkt. 225).

⁵ See Gov. Sentencing Memo. re A. Centeno at 1-2, No. 19-cr-00381-WHO, filed Aug. 4, 2020 (Dkt. 273)

1 faced more than the theoretical exposure to a life-threatening virus. He was quarantined four times
 2 due to exposure in his housing unit – the presence of the virus much closer than for inmates not
 3 housed in affected housing units or the general public – and then he ultimately contracted COVID-
 4 19. Boro Decl. at ¶ 5 & Ex. 4. This repeated psychological stress and actual infection with a
 5 dangerous virus with unknown long-term health consequences – all the while entrusted to the care
 6 and custody of the Government – is certainly worth double, triple, or quadruple time. For purpose of
 7 considering sentencing disparities under Section 3553(a)(6), the Court could reasonably view his
 8 time served as equivalent to 26, 39, or 52 months under normal conditions.

9 The punishment for a crime, especially for a non-violent offender with no prior convictions,
 10 should not be psychological trauma and a disease with unknown life-long health consequences. Yet
 11 that is the sentence that has been imposed on Mr. Cruz Rodriguez in this case. It is respectfully
 12 submitted that even if the Court were to agree with the Government that he deserves a longer
 13 sentence than the previously sentenced street dealers in this case, he has already served that longer
 14 sentence and then some.

15 V. CONCLUSION

16 For the foregoing reasons, Mr. Cruz Rodriguez respectfully requests that the Court grant
 17 his motion for a downward variance to a sentence of time served on Count 1 of the Superseding
 18 Information (which is 13 months in custody), followed by a 3-year term of supervised release, and
 19 order his immediate release from the custody of the United States Marshal.

20 Dated: September 13, 2020

21 Respectfully Submitted:

22 BORO LAW FIRM

23 /s/ Albert J. Boro, Jr.

24 ALBERT J. BORO, JR.
 25 Attorneys for Defendant
 26 ARNOLD CRUZ RODRIGUEZ